Memorandum 94-44

New Topics and Priorities

BACKGROUND

It is the Commission's practice annually to review the topics on its calendar, consider suggested new topics, and determine priorities for work during the coming year and thereafter.

A year ago after reviewing topics and priorities, the Commission decided that its highest priority would be preparation of a report on trial court unification under SCA 3. Any remaining time should be devoted to wrapping up work on existing projects nearing completion (power of attorney law, effect of joint tenancy title on community property, administrative adjudication) and to addressing the statutorily mandated creditors' remedies projects that have specific date deadlines.

The Commission has delivered its report to the Legislature on the constitutional amendment under SCA 3. The staff had begun groundwork for statutory implementation of SCA 3, but has now discontinued it due to the failure of the Legislature to approve SCA 3. The power of attorney law has been enacted. The effect of joint tenancy title on marital property recommendation has not been enacted, but the Commission has decided to give this matter further attention in the hope of eliminating opposition to it. The Commission has issued a revised tentative recommendation on administrative adjudication leading towards a final recommendation for next legislative session. The creditors' remedies matters are under active consideration.

This memorandum reviews other matters on the Commission's Calendar of Topics that the Commission might wish to give a priority to during the coming year, and summarizes suggestions we have received for new topics that should be studied. The memorandum concludes with staff recommendations for allocation of the Commission's resources.

TOPICS CURRENTLY AUTHORIZED FOR COMMISSION STUDY

There are 24 topics on the Commission's Calendar of Topics that have been authorized for study by the Commission. Many of these are topics the Commission has completed work on; they are retained in case corrective legislation is needed.

Below is a discussion of the topics on the Commission's Calendar. The discussion indicates the status of each topic and the need for future work. If you believe a particular matter deserves priority, you should raise it at the meeting.

Creditors' Remedies

Beginning in 1971, the Commission made a series of recommendations covering specific aspects of creditors' remedies and in 1980 obtained enactment of a comprehensive statute covering enforcement of judgments. Since enactment of the Enforcement of Judgments Law, the Commission has submitted a number of recommendations to the Legislature.

Exemptions. Code of Civil Procedure Section 703.120 requires that the Law Revision Commission by July 1, 1993, and every ten years thereafter, review the exemptions from execution and recommend any changes in the exempt amounts that appear proper. The Commission has deferred work on this task to January 1, 1995, due to budgetary considerations, as authorized by Government Code Section 7550.5. This matter is under active consideration by the Commission.

Judicial and nonjudicial foreclosure of real property liens. This is a matter that the Commission has recognized in the past is in need of work. A study of judicial and nonjudicial foreclosures would be a major project.

Default in a civil action. From time to time, the Commission has received letters suggesting that default judgment procedures are in need of study so that the existing provisions can be reorganized and improved in substance. This probably would not be as difficult as the study of foreclosure.

Probate Code

The Commission drafted the new Probate Code and remains somewhat active in the field.

Effect of joint tenancy title on marital property. This issue remains under active study by the Commission.

Definition of community property, quasi-community property, and separate property. The Commission has received communications addressed to

problems in the definition of marital property for probate purposes. We understand the State Bar Estate Planning and Family Law Sections are working on this jointly.

Uniform rules on survival requirements, antilapse provisions, revocation, and change of beneficiaries for wills and will substitutes. We have on hand studies prepared by Professor French on antilapse provisions. The Uniform Law Commission has just completed work in this area. The State Bar has sponsored legislation for standardized rules of construction, which is now pending before the Governor. We would continue to defer work on it so as not to duplicate the State Bar's efforts.

Application of family protection provisions to nonprobate transfers. A related issue that the State Bar is not touching is whether the various probate family protections, such as the share of an omitted spouse or the probate homestead, should be applied to nonprobate assets. The staff believes this issue is important and becoming critical as more and more estates pass outside probate. We have received phone calls from several lawyers about it, and the issues are popping up in the advance sheets. The Commission should address this problem.

Nonprobate transfers of community property. The legislation enacted on Commission recommendation has received a fair amount of criticism from some quarters, particularly from Professor Halbach. The Commission should review the legislation to determine whether corrective action is necessary.

Professor Kasner's study on this matter raised a number of important issues that the Commission deferred. Many of these issues relate to family law and community property as well as estate planning:

Whether the statute providing for unilateral severance of joint tenancy real property should be extended to personal property such as securities.
Liberalization of gift statute (de minimis gifts, gifts made with tacit consent).
Review of policy of Fam. C. § 2640 (separate property contributions to property acquisition).
Gifts in view of impending death.
Life insurance (definition of the community property interest of uninsured spouse).
Federal preemption of community property rules under ERISA.
Terminable interest rule—has it been repealed for purposes of rights at death?

Rights of heirs of consenting spouse after death of consenting spouse; duties of donor spouse until death of consenting spouse.
Revision of transmutation statute.
Are community property presumptions still necessary?
Should rules governing separate and community rights in the case of property improvement be further adjusted?
Review nonprobate transfers of quasi-community property.

Creditors' rights against nonprobate assets. The staff has identified policy issues. The Commission will monitor experience under the new trust claims statute to see whether to proceed with this project.

Alternative beneficiaries for unclaimed distribution. The concept is that unclaimed property distributed in probate would go to secondary heirs rather than escheat. The Commission decided to wait until the State's finances improve before considering this.

Filing fees in probate. The staff has done substantial work trying to make sense out of the filing fee system in probate, supported by the practicing bar. Court clerical staff had problems with this, and negotiations between clerks and lawyers have apparently lapsed. The Judicial Council has proposed legislation on the same issue. The staff plans to reactivate this worthwhile matter sometime.

Other matters the Commission has deferred for future study. In the process of preparing the new Probate Code the Commission identified a number of areas in need of further study. These are all matters of a substantive nature that the Commission felt were important but that could not be addressed quickly in the context of the code rewrite. The Commission has reserved these issues for study on an ongoing basis. Topics on the "back burner" list include:

Statutory 630 affidavit form
Transfer on death designation for real property
Summary guardianship or conservatorship procedure
Uniform Transfers To Minors Act
Interest on lien on estate property (attorney fees)
Tort & contract liability of personal representative
Rule Against Perpetuities and charitable gifts
Jury trial on existence of trust
Multiple party bank account forms

Real and Personal Property

The study of property law was authorized in 1983, consolidating various previously authorized aspects of real and personal property law into one comprehensive topic.

Application of Marketable Title Act to obsolete restrictive covenants. The Commission made a series of recommendations designed to improve the marketability of title to property. Provisions were enacted on Commission recommendation to remove clouds on title created by (1) ancient mortgages and deeds of trust, (2) dormant mineral rights, (3) unexercised options, (4) powers of termination, (5) unperformed contracts for sale of real property, and (6) abandoned easements. The Commission plans to monitor adoption of the Uniform Dormant Mineral Interest Act in other jurisdictions, and if there appears to be widespread acceptance, will again raise the issue of adoption of the uniform act in California. The Commission has long planned to undertake a study to determine whether and how the marketable title statute should be made applicable to obsolete restrictive covenants; this is an important but rather difficult matter.

Covenants that run with the land. Another real property matter that the academics agree should be addressed is repeal of Civil Code Section 1464, relating to covenants that run with the land. It is said to be a trap for lawyers and has been on the Commission's Calendar of Topics for many years. This is a small project we could work into the agenda for review when the Commission has time.

Adverse possession of personal property. The Commission has withdrawn its recommendation on this matter pending consideration of issues raised by the State Bar Committee on Administration of Justice. The Commission has made this a low priority matter.

Family Law

The study of family law was authorized in 1983, consolidating various previously authorized studies into one comprehensive topic.

Marital agreements made during marriage. California now has the Uniform Premarital Agreements Act and detailed provisions concerning agreements relating to rights upon death of one of the spouses. However, there is no general statute governing marital agreements during marriage. Such a statute would be useful, but the development of the statute might involve controversial issues.

Also, the issue whether the right to support can be waived in a premarital agreement should be considered.

The List. Many substantive issues raised in connection with drafting the Family Code have been preserved on "The List". The List is in the hands of other interested groups and the Assembly Judiciary Committee has been active in preparing legislation dealing with many of these matters. There does not seem to be much need to duplicate the Committee's efforts.

Prejudgment Interest

This topic was added to the Commission's Calendar of Topics by the Legislature in 1971 because some members of the Legislature believed that prejudgment interest should be recoverable in personal injury actions. This topic was never given priority by the Commission. The Commission doubted that a recommendation by the Commission would carry much weight, given the positions of the Trial Lawyers Association and the insurance companies and other potential defendants on the issue.

Class Actions

This topic was added to the Commission's Calendar of Topics in 1975 on request of the Commission. However, the Commission never gave the topic any priority because the State Bar and the Uniform Law Commissioners were reviewing the Uniform Class Actions Act. Only two states—Iowa and North Dakota—have enacted it, and it has been downgraded to a Model Act. The staff questions whether the Commission could produce a statute in this area that would have a reasonable chance for enactment, given the controversial nature of the issues involved.

Offers of Compromise

This topic was added to the Commission's Calendar of Topics at the request of the Commission in 1975. The Commission was concerned with Section 998 of the Code of Civil Procedure (withholding or augmenting costs following rejection or acceptance of offer to allow judgment). The Commission noted several instances where the language of Section 998 might be clarified and suggested that the section did not deal adequately with the problem of a joint offer to several plaintiffs. Since then Section 3291 of the Civil Code has been enacted to allow recovery of interest where the plaintiff makes an offer pursuant to Section 998.

The Commission has never given this topic priority, but it is one that might be considered by the Commission sometime in the future on a nonpriority basis when staff and Commission time permit work on the topic.

Discovery in Civil Actions

The Commission requested authority to study this topic in 1974. Although the Commission considered the topic to be an important one, the Commission did not give the study priority because a joint committee of the California State Bar and the Judicial Council produced a new discovery act that was enacted into law.

Procedure for Removal of Invalid Liens

This topic was added to the Commission's Calendar of Topics by the Legislature in 1980 because of the problem created by unknown persons filing fraudulent lien documents on property owned by public officials or others to create a cloud on the title of the property. The Commission has never given this topic priority, but it is one that might be considered on a nonpriority basis in the future when staff and Commission time permit. The staff has done a preliminary analysis of this matter that shows a number of remedies are available under existing law. The question is whether these remedies are adequate.

Special Assessment Liens for Public Improvements

There are a great number of statutes that provide for special assessments for public improvements of various types. The statutes overlap and duplicate each other and contain apparently needless inconsistencies. The Legislature added this topic to the Commission's Calendar of Topics in 1980 with the objective that the Commission might be able to develop one or more unified acts to replace the variety of acts that now exist. (A number of years ago, the Commission examined the improvement acts and recommended the repeal of a number of obsolete ones. That recommendation was enacted.) This legislative assignment would be a worthwhile project but would require a substantial amount of staff time.

Injunctions

This topic was added to the Commission's Calendar of Topics by the Legislature in 1984 because comprehensive legislation was proposed for enactment and it was easier for the Legislature to refer the matter to the Commission than to make a careful study of the legislation. The Commission has decided that due to limited funds, it will not give priority to this study, unless

there is a legislative directive indicating the need for prompt action on this matter. The Commission in 1994 sponsored statutory clarification of one aspect of the law governing orders to show cause and temporary restraining orders; the measure is before the Governor.

Rights and Disabilities of Minors and Incompetent Persons

The Commission has submitted a number of recommendations under this topic since its authorization in 1979 and it is anticipated that more will be submitted as the need becomes apparent.

Child Custody, Adoption, Guardianship, and Related Matters

The Commission obtained several background studies on child custody and adoption pursuant to this 1972 authority, but never pursued them. The Legislature is actively involved in this area and the staff would not devote Commission resources to it.

Evidence

The California Evidence Code was enacted upon recommendation of the Commission. Since then, the Federal Rules of Evidence have been adopted. The Commission has available a background study that reviews the federal rules and notes changes that might be made in the California code in light of the federal rules. However, the study was prepared many years ago and would need to be updated before it is considered by the Commission. In addition, a background study by an expert consultant of the experience under the California Evidence Code (enacted 30 years ago) might be useful before the Commission undertakes a review of the Evidence Code.

Arbitration

The present California arbitration statute was enacted in 1961 upon Commission recommendation. The topic was retained on the Commission's Calendar so that the Commission has authority to recommend any needed technical or substantive revisions in the statute.

Inverse Condemnation

The Commission has made recommendations to deal with specific aspects of this 1971 topic but has never made a study looking toward the enactment of a comprehensive statute, primarily because inverse condemnation liability has a

constitutional basis and because it is unlikely that any significant legislation could be enacted.

Administrative Law

This topic was referred to the Commission in 1987 both by legislative initiative and at the request of the Commission It is under active consideration by the Commission. The Commission has circulated a tentative recommendation on the first portion of the study, relating to administrative adjudication, which will be reviewed and revised in the fall and winter, with legislation introduced in 1995.

The second phase of the administrative law study is judicial review, on which the Commission is currently working. We have received background studies from Professor Asimow and made some initial policy decisions and reviewed some initial drafts. The Commission has decided to wrap up work on administrative adjudication before pursuing judicial review.

Payment and Shifting of Attorneys' Fees Between Litigants

The Commission requested authority to study this matter in 1988 pursuant to a suggestion by the California Judges Association. The staff has done a substantial amount of work on this topic. We understand that an American Bar Association committee is publishing proposals based on the staff's work.

The Commission has deferred work on this subject pending receipt from the CJA of an indication of the problems they see in the law governing payment and shifting of attorneys' fees between litigants.

Family Code

The Family Code project was assigned by the Legislature in 1989 on a priority basis. The Code has been enacted. The Commission should maintain a continuing review under this authority over the next few years to take care of technical problems that may surface.

Uniform Unincorporated Nonprofit Association Act

This topic was authorized in 1993 on request of the Commission. The Commission has retained Professor Michael Hone of University of San Francisco Law School to prepare a background study. The study was due at the end of 1993. Professor Hone indicates that the study is in progress but has taken longer

than expected due to confusion in the state's case law on the subject. His current projected completion date for the study is December 31, 1994.

Business Judgment Rule and Derivative Actions

This topic was authorized in 1993 on request of the Commission. The Commission has retained Professor Melvin Eisenberg of University of California, Berkeley, Law School to prepare a background study. The study is due September 1994. Professor Eisenberg reports that he has been delayed by a revision of his casebook. However, he has committed to delivery of the background study by March 31, 1995.

Unfair Competition Litigation

This topic was authorized in 1993 on request of the Commission. The Commission has retained Professor Robert Fellmeth of University of San Diego Law School to prepare a background study. The study is due at the end of 1994.

Professor Fellmeth reports that he is making good progress on the study. The study is timely, in his opinion, since the problems in the law are becoming more evident. He plans to deliver a preliminary draft in December and a final draft in January.

Trial Court Unification

This topic was assigned by the Legislature in 1993, with a report date on the constitutional amendments by February 1, 1994, and statutory recommendations later. The Commission delivered its report to the Legislature on constitutional amendments under SCA 3 on schedule.

SCA 3 was not adopted by the Legislature. The statutory implementation of SCA 3 would have been a massive project that would have taken all of the Commission's time during the coming year. The demise of SCA 3 will enable the Commission to undertake some other projects.

Tolling Statute of Limitations While Defendant Is Out of State

This topic was authorized in 1994 on request of the Commission. The issue is whether Code of Civil Procedure Section 351, tolling statutes of limitations while the defendant is out of state, should be revised in light of developments in the law relating to long arm jurisdiction. There is a recent law review article on this topic that could serve as a background study on the matter.

NEW TOPICS

During the past year the Commission has received a number of suggestions for study of new topics. See Exhibit pp. 1-30. These suggestions are discussed below. Most of these topics could be considered under existing authority, although prior legislative authorization would be required for harmonizing California civil procedure with federal civil procedure or for the small claims appeals issue.

Harmonizing California Civil Procedure With Federal Civil Procedure

William R. Slomanson, a civil procedure professor at Western State University College of Law and author of the California Civil Practice Handbook on The Choice Between State and Federal Courts (West 1994), writes to suggest creation of a commission on intersystem civil practice. Exhibit pp. 1-10. Professor Slomanson notes that procedural differences between state and federal courts cause problems for lawyers, and suggests creation of a commission whose function would be to identify differences and propose harmonizing changes (perhaps middle ground) at state and federal levels. Such a commission might be composed of representatives of the Law Revision Commission, Judicial Council, Judicial Conference of the United States, Ninth Circuit Council, National Center for State Courts, and Federal Judicial Center.

The staff notes that when the Commission revised the California pleading statutes in 1970, we considered adoption of federal-style cause of action pleadings, but ultimately decided to retain California's fact pleadings.

The Commission some time ago commissioned a study that compares the California Evidence Code with the Federal Rules of Evidence and notes changes that might be made in the California code in light of the federal rules. However, the study would need to be updated before it is considered by the Commission.

If the Commission is interested in this area, it would be possible for the Commission to propose revisions with the objective of harmonizing state and federal civil practice, apart from the deliberative body envisioned by Professor Slomanson. This would be an appropriate matter for Commission study. The Commission would need to request Legislative authorization to undertake such a project.

Admissibility Of Electronically Recorded Signatures

Gerald H. Genard of San Francisco (Exhibit pp. 11-12) notes that the evidentiary rules governing original documents and signatures have fallen behind the times and fail adequately to address issues involving documents and signatures transmitted electronically by computer or fax. For example, Evidence Code Section 1550 refers to a photographic copy made and preserved as a business record but does not deal with a digitized copy that has been stored and is reproducible electronically.

One concern would be that rapid changes in technology may quickly render obsolete statutes geared to current practice. Perhaps statutes could be formulated in a generic way, not linked to any particular type of technology.

This would be an appropriate matter for Commission study, if the Commission is interested. The staff would schedule the matter for consideration as time and resources permit; separate Legislative authorization would not be necessary.

Small Claims Appeals Involving Multiple Defendants

Gerald H. Genard of San Francisco (Exhibit p. 13) writes to suggest that the Small Claims Act needs clarification. Code of Civil Procedure Section 116.770 is ambiguous whether, in a case involving multiple defendants, an appeal by one defendant requires a trial de novo as to all defendants.

The staff believes this is a matter appropriately handled by the Judicial Council, which is charged with the obligation to "provide by rule for the practice and procedure and for the forms and their use in small claims actions." Code Civ. Proc. § 116.920. The staff would refer Mr. Genard's letter to the Judicial Council.

Codification Of Privilege For Income Tax Returns

Gerald H. Genard of San Francisco (Exhibit pp. 14-15) believes the evidentiary privilege that protects income tax returns from disclosure should be revised and codified. The privilege is a case-law privilege, based on taxation statutes that preclude public officials from disclosing the returns.

Mr. Genard notes that the income tax return privilege is unusual in that it is absolute, whereas in other circumstances where a claim of privacy is raised the court weighs the need for the information against the policy supporting the privilege, and makes protective orders where necessary (e.g., partial disclosure,

redaction, limited access to the information, etc.) "The Evidence Code should be amended to create a section dealing with this privilege in the more balanced way suggested herein and expressly overruling the case law."

The staff notes that specific statutes have been enacted in recent years to permit disclosure of income tax returns in specific situations, such as determination of child and spousal support matters.

This would be an appropriate matter for Commission study, if the Commission is interested. The staff would schedule the matter for consideration as time and resources permit; separate Legislative authorization would not be necessary.

Long-Arm Jurisdiction in Support Enforcement

Professor Friedrich K. Juenger, of the University of California at Davis Law School, suggests that the Commission consider his proposal to revise the law relating to jurisdiction to determine support obligations owed a resident by a nonresident. (See Exhibit pp. 16-28.) Professor Juenger's proposal has been fully fleshed out and presented in bill form, as you can see from the copy of AB 3151 attached. (See Exhibit pp. 17-19.) As reported in his letter, the bill had no support and languished in the Assembly Judiciary Committee.

Professor Juenger argues that the existing law, as embodied in the Uniform Reciprocal Enforcement of Support Act (URESA) in Family Code Section 4800 *et seq.*, is inadequate, inefficient, and results in insufficient support awards. URESA implements a two-state proceeding, with the obligee in the initiating state and the obligor in the responding state where enforcement is to take place. The obligation is typically tied to the law applicable in the state of the obligor's residence. Professor Juenger would focus on the support obligee (and the state's right of reimbursement for expenditures in behalf of obligees) and base the obligation and jurisdiction where the obligee resides.

This approach raises constitutional issues. The language of AB 3151 is intended to satisfy constitutional standards, particularly as set out in Kulko v. Superior Court, 436 U.S. 84 (1978). Whether this can be done is a point of contention. The committee consultant's analysis of AB 3151 raises serious questions about the constitutionality of the proposal. (See Exhibit pp. 25-28.) The consultant's analysis raises a number of other concerns, such as possible retaliation by other states, conflict with existing procedures and developing rules, and increasing the burden on California courts. For the full flavor of the

debate, you should read Professor Juenger's letters and the consultant's analysis; the staff has not attempted to come to its own conclusions on the due process and related issues.

The Legislature has been considering related issues during the 1993-94 session in the form of the Uniform Interstate Family Support Act (UIFSA) which is intended to replace URESA. AB 20 (Sher), which would have enacted UIFSA, was held in the Senate Judiciary Committee. Presumably the Legislature will again be considering this subject in the next session.

The question here is whether the Commission should study this matter. It does not appear that the Commission's involvement is needed. The proposal is well-developed and well-supported. It has even been put in bill form. The proposal is at a stage of development where it does not look like the Commission would be able to add much. About all that is left for the Commission would be to come down on one side of the issue, particularly the constitutional question, or the other. The staff doubts that this would be a beneficial expenditure of Commission resources, particularly in light of the lack of support in the Legislature. At this stage, it looks as if the proponents need to find legislative support — the time for study by the Law Revision Commission has passed.

Uniform Prudent Investor Act

The National Conference of Commissioners on Uniform State Laws approved a new Uniform Prudent Investor Act (UPIA) this summer. The act adopts a modern, portfolio approach to investments by trustees, and makes a number of other changes, such as eliminating restrictions on types of investment, providing for diversification, and permitting delegation of investment and management functions. The act is a statutory implementation of the work done in the new Restatement (Third) of Trusts: Prudent Investor Rule (1992).

The California Trust Law, enacted on Commission recommendation, contains several of these features, but might well benefit from a review in light of the new UPIA. California is among the handful of states that has already adopted the portfolio approach, albeit in different language. See Prob. Code § 16040. (This is not a coincidence, inasmuch as Professor Halbach, the Reporter on the new Trust Restatement, has been a Commission consultant for many years and early alerted the Commission to the developments in this area, particularly in the form of the work of Professor John Langbein, who is the Reporter on the new Uniform Prudent Investor Act.)

The aim of a study of this issue would be to promote uniformity and make any useful adjustments in California law. It would also be appropriate to consider the application of such standards to other fiduciaries, such as personal representatives, guardians, conservators, and custodians. The staff does not believe this project would require much staff or Commission time and could be advanced on a fairly expeditious schedule, since the issues, insofar as the Trust Law is concerned, are not particularly difficult and the changes in California law would not be dramatic. For more detailed discussion and the draft of a tentative recommendation on the subject, please see Memorandum 94-47.

Durable Power of Attorney for Health Care and Uniform Health-Care Decisions Act

The Power of Attorney Law, enacted this session on Commission recommendation, did not make substantive revisions of the rules concerning the durable power of attorney for health care. In the course of the study, the Commission was urged by the State Bar Team to revise health care powers along with property powers. In the process of seeing the bill through the Legislature, the staff heard comments from committee staff and lobbyists indicating interest in further review of the health care power. The Commission has not committed itself to such a study and, in view of other major projects such as administrative law and trial court unification, has resisted giving the impression that it intends to take up this subject. Of course, part of the reluctance has to do with the expected difficulties in getting a bill through the Legislature on this potentially controversial subject. There are interest groups who probably expect the Commission to do the job as the sponsor of the original legislation on durable powers of attorney for health care. Because of the potential conflict of different interest groups, a neutral body such as the Commission is perhaps the best hope for being able to get a bill through the Legislature.

The staff believes the California statute has withstood the test of time fairly well, but it could benefit from a complete review in light of the experience in other states over the past decade and in consideration of the new Uniform Health-Care Consent Act (1993). (See Exhibit pp. 29-30, Prefatory Note.)

CONCLUSION

With SCA 3 no longer in the picture, the Commission and staff will have an opportunity to take care of a fair amount of other business during the coming year.

1995 Legislative Program

The staff would give first priority during the remainder of 1994 to completing projects currently underway, with a view to introduction in the 1995 legislative session. The staff believes the following are feasible for the Commission's 1995 legislative program:

Administrative adjudication. We need to review comments on the revised tentative recommendation, finalize the proposal and conforming revisions, and obtain enactment of the measure. This will take a fair amount of Commission and staff time.

Effect of joint tenancy title on marital property. We need to develop a consensus proposal for introduction next session. The affected interest groups have pledged to work with the Commission. This will require only a modest amount of Commission and staff time.

Creditors' remedies. The statutorily required reports on exemptions and attachment must be completed by the end of 1994, and miscellaneous creditors remedies matters wrapped up. This will require only a modest amount of Commission and staff time.

Uniform Prudent Investor Act. This is newly-adopted uniform act is consistent with California law. It would be a nice addition to the California Trust Law, and should not be a problem to get enacted. The staff is interested in pushing this project immediately to help fill the void in the Commission's 1995 legislative program left by the absence of SCA 3. We have scheduled this matter for Commission consideration in Memorandum 94-47.

Priorities for Future Sessions

The staff would give next priority to matters that have been activated by the Commission but that will take longer to complete. Work on these matters would take place primarily during 1995. These topics are:

Judicial Review of Agency Action. Professor Asimow's background studies have been completed and delivered to the Commission. The Commission has made some initial policy decisions and reviewed some initial drafts. A fair

amount of work still needs to be done to develop a tentative recommendation, but it would not be unrealistic to set September 1995 as a target date.

Uniform Unincorporated Nonprofit Association Act. This project should not require much Commission or staff time. The objective is to compare existing California law with the new uniform act and decide whether the uniform act should be adopted in its place or whether any useful provisions should be picked up from the uniform act. The two bodies of law are small and fairly similar. The staff's plan is simply to circulate the background study for review (on receipt from Professor Hone), and make decisions based on commentary received on the background study. This can be worked into the Commission's agenda as time permits.

Unfair Competition Litigation. We expect delivery of the background study from Professor Fellmeth at the beginning of the year. This will be a fairly substantial project, but we should address it while the background study is fresh.

Business Judgment Rule and Derivative Actions. We expect delivery of the background study on these corporate governance issues during Spring of 1995. This should be a fairly short project — the issues are clear and there are good models of laws available, including Delaware law and the Restatement of Law. It's really a question of getting good input for making sound policy decisions.

Miscellaneous Other Matters. The projects listed above should absorb most of the Commission's available resources during 1995. However, scheduling is dependent on delivery of consultant studies and availability of consultants. The staff thinks there will be opportunities to work smaller matters into the agenda from time to time, depending on staff workload and meeting schedules. Issues the staff has in mind include revisiting **nonprobate transfers of community property**, application of marketable title act to **obsolete restrictive covenants**, revisiting **adverse possession of personal property**, and **tolling statute of limitations while defendant is out of state**.

New Topics

Of the possible new topics that have been suggested for future Commission consideration, the staff believes that the following may be appropriate:

Harmonizing California Civil Procedure With Federal Civil Procedure. The staff has mixed feelings about this one, since the concern may be more academic than real. How do the Commissioners who have had experience litigating in both

systems feel about this? Legislative authorization would be required for this project, except the portion relating to evidence.

Uniform Prudent Investor Act. This can be handled expeditiously and the staff has recommended we make it part of our 1995 legislative program. No new legislative authorization is necessary.

Evidence Code Issues. The suggestion that evidentiary rules be codified for the income tax return privilege and for authentication of electronic documents would not require legislative authorization. While the staff is not suggesting we pursue these matters, if they interest the Commission we would try to work them into the agenda on a low priority basis.

Durable Power of Attorney for Health Care. This would be a substantial but worthwhile project. The staff suggests we retain this matter for work in the future, perhaps 1996.

Effect of SCA 3

These staff recommendations are subject to legislative action on SCA 3. Although the matter is dead for now, it is possible that the issue will be raised again in the 1995 legislative session. We may need to put other matters on hold to tend to trial court unification on an expedited basis, depending, among other factors, on the outcome of the November elections.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

WSU ANNIVERSARY San Diego 1969 - 1994

WESTERN STATE UNIVERSITY COLLEGE OF LAW
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August 15, 1994

Dear sir/madam:

The enclosed proposal was simultaneously published in the following newspapers on August 3, 1994: the San Francisco Daily Journal, the Los Angeles Daily Journal, and the San Diego Daily Transcript.

I am forwarding a copy either because your entity was suggested as a possible participant or your office may have an interest in the content of this proposal.

The enclosed proposal is my own and does not represent the views of any other person or institution.

Very truly yours,

Bill

William R. Slomanson
Professor of Law

INTERSYSTEM CIVIL PRACTICE COMMISSION

Proposal for Study and Recommendations Regarding Differences between California State and Federal Civil Practice

by William R. Slomanson

The Buck Doesn't Stop

Too many California lawyers have experienced the same cataclysmic ordeal when suddenly confronted with a significant difference between state and federal civil practice. Too often, this happens in the courtroom or when a critical motion has been lost.

There are a number of significant evidentiary and procedural differences in California's state and federal systems. One reason is for these differences is the underlying federalism that has been a part of California's jurisprudence since it achieved statehood. Federal cases are thus heard in state court--all the time. Typically, Congress does not want to withhold federal remedies from state litigants. State cases are heard in federal court--all the time (28 U.S.C.A. § 1332). This is the familiar concept of Diversity Jurisdiction studied by first year law students. There is a resulting presumption of *concurrent* subject matter jurisdiction exercisable by both state and federal courts. This presumption is overcome only by a congressional mandate of *exclusive* jurisdiction. (*See, e.g.*, Tafflin v. Levitt, 493 U.S. 455, 458-59 (1990)). Congress has thus withheld federal remedies from state litigants in a limited number of federal actions.

The garden-variety state civil case, with no possibility of a "federal question" lurking beneath the surface, is unaffected by this presumption of concurrent subject matter jurisdiction. Although there is generally no minimum amount in controversy for cases arising under federal law, a superior or municipal court cannot be removed to federal court unless it happens to contain a claim that could be characterized as a claim arising under

federal law. And in state cases, where the appropriate parties happen to be domiciled in different states, the defendant can remove the case to federal court only if the amount in controversy is greater than $50,000.00 (28 U.S.C.A. § 1332--which may be increased in 1995 under pending legislation).

Where a case is unalterably lodged in one system or the other (e.g., bankruptcy which is exclusively federal or the state-bound less than $50,000.00 fender-bender), there are still a number of evidentiary and procedural differences which the lawyer with a state and federal practice could characterize as virtual reality. These differences are very real, in the sense that they control how the particular files are driven in one system (state) or the other (federal). Yet the lawyer responsible for their execution may fairly question why some programmer chose different commands, rather than using the same command for all system files.

There should be an organized endeavor to assess the reason behind such differences--if only to determine whether there is some middle ground inhabitable by both sets of rules. Distinctions without clear system-based differences do nothing to foster respect for the legal system or to serve the needs of the client. This recommendation may mean little to the many practicing lawyers who have no time but to react to the rules changes from which they often feel disenfranchised. The new federal rules of December 1, 1993 are a classic example since more than half of the nation's federal *judges* have temporarily suspended them.

Another reason for many differences in state and federal civil practice is that when any task is undertaken by two or more people, at least two solutions are possible. Lawyers also find that there are special rules which sometimes lead one system's judge to use the other system's rule in the particular case.

Thus deciding whether to venture into one forum or the other--or when one is yanked there via removal from state to federal court--is not unlike Dorothy's trip to "Oz." All who accompanied her had some familiar problems but none were assured of predictable answers.

There are also a number of arguably non-reasoned reasons for this predicament, whereby most lawyers fee ill at ease with the interplay between state and federal court. It is thus important to summarize the potential avenues for shoring up this gap in legal training--whether or not the "Commission" proposal below is adopted. Plugging this educational gap might thus be deliberated at the various levels which follow.

First, contrasts surface only occasionally when a continuing education group conducts the rare seminar like last year's "Federalization of California Summary Judgment." MCLE speakers may then make anecdotal or passing references to some state/federal contrast which is not the essential theme of the seminar. (Note that the only comparative law seminar in a dozen years dealt primarily with a procedural similarity rather than a difference.)

Second, the California Bar Examiners apparently considered a remedy for this situation by announcing that they would test on both California Evidence and California Civil Procedure beginning with the Winter 1992 Bar Examination. In the Fall of 1991, however, that decision was rescinded--possibly due to the lack of published law school materials on *state* evidence and procedure. The Bar Examination tests on the *Federal* Rules of Civil Procedure and the *Federal* Rules of Evidence (multistate) and general common law rather than California (essay).

Third, most law schools in California do not teach state civil practice courses. The common rationale for the lack of *state* evidence and procedure electives is that a significant percentage of their graduates will practice in other states. Yet many California law school graduates *do* practice in California, including virtually all graduates of the state's eighteen California State Bar Examiner-approved schools.

Fourth, there have been only two major studies comparing state and federal civil practice rules since promulgation of the Federal Rules of Civil Procedure in 1938 (and the Federal Rules of Evidence in 1975). These were the *Study of the Division of Jurisdiction between State and Federal Courts* (Philadelphia: Amer. Law Inst., 1969) and the *Report of the Federal Courts Study Committee* (self-published, 1990--authorized by the Federal Courts Study Act of 1988, Pub. L. No.100-702, 102 Stat. 4642). Each of these national civil procedure studies concentrated on jurisdictional matters, sprinkled with some general discussion of forum selection factors. Neither study addressed *specific* procedural (and *no* evidentiary) practice differences in the numerous states within the U.S. Such a study would be apparently too complex and too costly.

Fifth, the state and local bar associations do not have standing committees for assessing the impact generated by the many differences in state and federal evidence and procedure. There are various standing committees in each system, studying the rules and recommending changes to the respective state and federal rules. The lenses they employ are not bifocal, however. Each concentrates on the existing rules in their own systems.

Finally, the state and federal Judicial Conferences do not directly address intersystem practice problems. These productive and overworked bodies have not had the time, resources, or pressure to study the problems of federalism that practitioners

must often learn about the hard way through trial by error.

The purpose of this commentary is not to suggest that "the buck stops here," with a view towards identifying suspected perpetrators. That would be both unproductive and inaccurate. Yet California lawyers are nevertheless condemned to unwittingly assuming one or more of the following scenarios: (a) the federal rules of procedure--taught in the first and most bewildering year of law school--will serve them well in their state practice; (b) the state evidence and procedure rules--not taught in *any* year in most California law schools--do not apply to one's federal practice; (c) the state and federal courts rarely, if ever, apply the "other" system's evidence and procedure rules; and (d) the respective rules are sufficiently fungible to make any differences *de minimis*.

Putting the Collar on the Cat

Burdened California practitioners would benefit immeasurably from the formation of a commission to identify intersystem practice differences for lawyers, to propose changes to the State Legislature and Congress, and to eliminate differences serving no immutable purpose. Whether lawyers are generally limited to ten depositions (new federal rules currently applied in some but not all of California's federal districts) seems to perpetuate only the negative perceptions of forum shopping. For significant differences such as the admissibility of subsequent remedial repairs in strict liability cases, each system's advocates may appear to be locked irretrievably into diverse positions with no change on the horizon. (*Compare* Fed. Rule Evid. 407 *with* Ault v. Int'l Harvester, 13 Cal.3d 113 (1974)).

The proposed commission (or similar entity) would serve the following practical purposes: (1) identifying differences--first "large," and then "small" if resources permit; (2) ascertaining whether certain differences exist only because no one has

bothered to comment about them; (3) reporting those differences to interested judges and practitioners; and (4) attempting to find a middle ground between conflicting state and federal rules that might be acceptable to advocates in both systems. The mice in one of *Aesop's Fables* decided to place the warning bell around the cat's neck, without deciding *who* would put the collar into place. The following entities are thus suggested as potential contributors for solving this particular riddle.

The California Law Revision Commission (CLRC) would be one candidate for contributing to a joint committee for analyzing intersystem practice matters. Its mandate is to recommend changes that will eliminate defects and anachronisms, assess inequitable rules of law, and bring the law in harmony with modern conditions. But that Commission is presently limited to the examination of "the common law and statutes of the *state*..." (Cal. Gov't Code § 8289(a)--italics added). The CLRC is credited with taking the lead in the six-year revision of the Probate Code during the 1980s and in revising family law practice over the years--neither of which involved federal matters. That Commission may receive proposed changes in the law from outside bodies. But external reports to the CLRC have dealt essentially with substantive law changes proposed by entities such as the American Law Institute and the National Conference of Commissioners on Uniform *State* Laws. Neither of these latter entities would likely tackle this proposal on a *national* basis, nor would they limit their study to practice state/federal practice differences in just one state.

The Judicial Council of California would be another entity for providing input to the proposed joint commission/committee. Its committees include the Superior Courts Committee and the Municipal Courts Committee (see Annual Report of the Judicial Council of California), but no standing committee to monitor parallel *federal* practice and procedure developments. The

Judicial Council's mandate is to survey the condition of the business of the *state* courts and make appropriate recommendations to the Governor and the Legislature. It thus functions to improve the administration of justice by making recommendations for the adoption of rules of practice and procedure "not inconsistent with statute" (Cal. Const., art. VI § 6)--a directive limited to state practice.

The federal counterpart to California's state Judicial Council is the Judicial Conference of the United States. This is the chief policy making body within the federal judiciary (28 U.S.C.A. § 331). There is also the Judicial Council of the Ninth Circuit (*see* Annual Report of the United States Courts for the Ninth Circuit). The Judicial Council for this federal circuit possesses the authority to "make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit" (28 U.S.C.A. § 332(d)(1)). One of those orders could be the appointment of an Intersystem Civil Practice Commission (or Committee) for the State of California. Such an order, based on prior consultation with the appropriate state entities, would conveniently overcome jurisdictional concerns about unwarranted federal involvement in state law matters. The Ninth Circuit Council (or national Judicial Conference) might press for federal legislation authorizing a joint state and federal commission. Public and/or private state entities would be "invited" to participate in a process of identifying differences and eliminating them where feasible.

Another candidate for inclusion on the proposed commission would be a member of the federal Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. The standing committees on the federal rules of evidence and procedure assist the U.S. Supreme Court in executing its function of proscribing "general rules of practice and procedure and rules of evidence for cases in the United States [federal] district

courts ... and courts of appeals" (28 U.S.C.A. § 2072). Each of these "'round the clock" entities could seize upon this opportunity by appointing a representative to serve on the proposed joint committee on intersystem practice matters. If this experiment worked in California, it could be expanded into other states.

The final suggestions for potential commission participants are the National Center for State Courts in Williamsburg, Virginia and the Federal Judicial Center in Washington, D.C. These entities conduct research and studies of various court systems throughout the nation. In 1992, they conducted the National Conference on State-Federal Relationships which was attended by a variety of judges, officials, and legislators, and law professors. The results of that Conference are published in Symposium, 78 Va. L. Rev. 1655-1902 (1992). While a number of the suggestions were excellent, they have yet to trickle down to benefit the day-to-day practice of the busy California practitioner. Which courts should be hearing which kinds of cases is not the kind of reading that helps the busy practitioner from being blindsided by an outcome-determinative evidentiary or procedural difference.

The proposed "Intersystem Civil Practice Commission" is not necessarily an antidote for the lack of law school, bar examination, or MCLE devices for incorporating federalism into the new (or seasoned) lawyer's perspectives. The proposed commission would address the extent to which state/federal practice differences *in fact* serve legitimate objectives for California lawyers and their clients. There should be a meaningful apparatus for bringing this critical facet of civil practice to the attention of more educators, legislators, judges, and--most of all--burdened practitioners.

William R. Slomanson is the author of the California Civil Practice Handbook on The Choice Between State and Federal Courts *(West 1994). He teaches Civil Procedure at Western State University (San Diego).*

Published August 3, 1994 in:

- San Francisco Daily Journal
- Los Angeles Daily Journal
- San Diego Daily Transcript

564 Mission Street #609
San Francisco, CA 94105-2918
May 3, 1994

Law Revision Commission
State of California
4000 Middlefield Road #D-2
Palo Alto, CA 94303-4739

Ladies and Gentlemen:

Re: Suggested Amendment to Civil and Evidence Codes Covering "Original" Documents and Signatures

The current attempts to deal with admissibility of photographic and computer-generated copies of documents in the Evidence Code (see Sections 1500.5 and 1550) do not address the question of whether electronically recorded signatures (e.g., signatures directly on a remote computer screen or on a document transmitted via a facsimile (fax) machine) are "originals." Indeed, the language of the current Evidence Code sections is so specific in categorizing methods of creating electronic copies that its failure to specifically include the two examples just mentioned leaves doubt as to whether those sections permit such electronic signatures to be admitted into evidence.

My suggestion is that given the widespread use of fax machines and the coming paperless environment and use of portable computers in business transactions, the Civil Code and Evidence Code be amended to add sections indicating that "written contracts" include contracts where signatures are obtained on computer screens or on faxed documents, that, in such cases, either a printout of such documentation, in the case of the computer screen example, or the fax received is the <u>original</u> document, and that the computer screen version or a printout or a fax document is admissible in evidence. In the use of a faxed

document, the original ink signature of the party to be charged would not be needed as long as the other party has a faxed document showing the signature of the party to be charged. The signature of each party, appearing on the fax, would be the original for the purpose of contract formation and also for the purpose of the best evidence rule. This is a particularly important rule where each contracting party signs and faxes a duplicate original to the other.

Very truly yours,

Gerald H. Genard

Gerald H. Genard

GHG:tln

564 Mission Street #609
San Francisco, CA 94105-2918
April 20, 1994

Law Revision Commission
State of California
4000 Middlefield Rd. #D-2
Palo Alto, CA 94303-4739

Ladies and Gentlemen:

Re: Proposed Revision Regarding the Small Claims Act

It has come to my attention that the current language of the Small Claims Act is unclear with respect to appeals involving multiple parties. Apparently, some court officials believe that a notice of appeal filed by any one of multiple losing defendants bring the entire case before the superior court at a trial de novo, while others believe that each losing defendant must file a separate notice of appeal.

I am inclined toward the latter view in light of the language in the statute stating that an appeal brings all "claims" made in the court below into the trial de novo, and a "claim" is defined as a request for affirmative relief and does not include a defense.

In any event, the matter would be resolved simply and expediently by amending the statute to require that each losing defendant must file a separate notice of appeal or else the small claims judgment is final as to that defendant. I suggest that the Commission adopt this recommendation to avoid inconsistent results from court to court, as the finality accorded to small claims appeals and the relatively small amounts involved make it unlikely that issue will be resolved by a Court of Appeal in the near future.

Very truly yours,

Gerald H. Genard

GHG:tln

564 Mission Street #609
San Francisco, CA 94105-2918
April 8, 1994

Law Revision Commission
State of California
4000 Middlefield Rd. #D-2
Palo Alto, CA 94303-4739

Ladies and Gentlemen:

Re: Proposed Addition to Evidence Code
Re Privilege for Income Tax Returns

I recommend a change in the California law of evidence to modify the application of the current judicially-created privilege protecting federal and state tax returns from disclosure in discovery proceedings or introduction into evidence.

The current law is explained in Schnabel v. Superior Court, 5 Cal.4th 704, 725 (1993). Briefly, the courts have fashioned a privilege preventing disclosure of income tax returns in civil litigation based upon provisions of the California Revenue and Taxation Code, making it unlawful for public officials to disclose information contained in state tax returns. The reasoning is that if a state official cannot disclose this information, parties to a civil lawsuit should not be compelled to do it either. Moreover, even though the state statute deals only with state returns, the privilege is extended to federal returns because the same information is contained in them. The theoretical basis for this privilege is that persons will be discouraged from being honest in their returns if they knew that the information was subject to disclosure.

As noted in Schnabel, there is no equivalent privilege in the federal court system. See 5 Cal.4th 704, 725, fn. 3. One would think that if the rationale supporting the privilege was so strong, the federal government, with much more to lose, would be even more concerned than California in encouraging taxpayer honesty.

Generally speaking, unless the privilege is waived, it blocks all disclosure. This should be contrasted to other situations where a claim of privacy is raised, such as requests for production of other financial records or personal information where the procedure when discovery is sought is for the court to weigh the compelling need for the information against the privacy privilege and strike the appropriate balance - e.g., allow total or partial disclosure where appropriate, or permit disclosure to counsel only under a protective order, or require partial obliteration of some information on a document while permitting disclosure of other information.

As the privilege for both federal and state tax returns completely excludes production without consent, it creates an invitation to commit perjury whenever lost profits, lost earnings, or earning capacity are in issue and secondary sources are not readily available - e.g., self-employment situations.

As in other cases dealing with the right to privacy, the courts should weigh the need for the information against the privacy interest and allow limited disclosure, if warranted, through protective orders, blanking out irrelevant portions of the returns, requiring production of the returns only to the court or to an independent party to assure veracity of other information, or by other traditional means of protecting confidential information.

The Evidence Code should be amended to create a section dealing with this privilege in the more balanced way suggested herein and expressly overruling the case law.

Very truly yours,

Gerald H. Genard

Gerald H. Genard

GHG:tln

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SCHOOL OF LAW

DAVIS, CALIFORNIA 95616-5201

June 3, 1994

Executive Secretary
California Law Revision Commission
4000 Middle Field Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Sir:

Following up on a telephone conversation with Staff Counsel Robert J. Murphy, Esq., I enclose copies of a bill introduced by Assemblywoman Diane Martinez and of letters I wrote in support of this bill.

While the bill attracted no support in the Assembly's Judiciary Committee, the problem it addresses will not go away. My proposal sets forth a simple and straightforward approach to a serious defect in American jurisdictional law, a pressing problem, with which the Commissioners on Uniform State Laws have attempted to deal in a rather more convoluted and ultimately less satisfactory manner. As far as the constitutionality of my proposal is concerned, I confidently predict that I will be upheld by the U.S. Supreme Court in its present composition, if indeed it should be challenged. I also predict that other states will follow California's lead.

Appreciating your interest, I am

Yours sincerely,

Friedrich K. Juenger
Barrett Professor of Law

FKJ/bl
Enc.

P.S. I was delighted to learn from Mr. Murphy that you decided against supporting the Conflicts of Jurisdiction Model Act which you had asked me to comment on last year.

AMENDED IN ASSEMBLY APRIL 4, 1994

CALIFORNIA LEGISLATURE—1993–94 REGULAR SESSION

ASSEMBLY BILL No. 3151

Introduced by Assembly Member Martinez
(Coauthors: Assembly Members Escutia and Umberg)

February 23, 1994

An act to add Section 410.15 to the Code of Civil Procedure, relating to support.

LEGISLATIVE COUNSEL'S DIGEST

AB 3151, as amended, Martinez. Support: jurisdiction over nonresidents.

Existing law enacts the Uniform Reciprocal Enforcement of Support Act, which provides for the determination of support obligations initiated by a resident of this state against a nonresident, in the state of residence of the latter person, provided that state has a similar law.

This bill would provide that, notwithstanding any other provision of law, a court of this state may exercise jurisdiction to establish support, modify support, or establish paternity if the person on whose behalf the action is brought resides in this state, and would declare the findings of the Legislature in this regard.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

98 80

The people of the State of California do enact as follows:

SECTION 1. Section 410.15 is added to the Code of Civil Procedure, to read:

410.15. (a) The Legislature finds that the welfare of large numbers of this state's citizenry depends on access to support from family members who live outside the state. It also finds that the State of California provides support to many of these citizens through its Aid to Families with Dependent Children program, for which the state is entitled to reimbursement from parents outside this state. Effective judicial means to establish and enforce family support obligations are required to ensure the support to which California citizens are entitled and to permit reimbursement to the state for its related expenditures.

The Legislature further finds that proceedings under the Uniform Reciprocal Enforcement of Support Act (URESA) are inadequate to this task. Proceedings under URESA are slow, the person entitled to support is not present in person before the court that determines support obligations, and awards entered are often less than would be expected if litigation took place in a single courtroom.

The Legislature is aware that a federal Commission on ~~Interstate Child Support has been appointed by Congress to address the difficulties of interstate support practice and that the Commissioners on Uniform State Laws are considering recommending changes to URESA designed to ameliorate the uniform act's deficiencies. The~~ *Interstate Child Support has recently addressed the difficulties of interstate support practice and that the Commissioners on Uniform State Laws have proposed a new Uniform Act with the hope of ameliorating URESA's deficiencies. The* Legislature also finds that international conventions developed in Europe and on this continent, which provide jurisdiction to determine family relationships and enter family support orders in the place of the claimant's habitual residence, promise fair and sensible resolutions to the problems faced by California

and its citizens.

The Legislature, therefore, finds that it is in the vital interest of California and its dependent citizens that California courts assert jurisdiction directly over all parties who may constitutionally be asked to appear here to determine their support obligations, and finds that jurisdiction based upon the claimant's residence in California is a constitutionally appropriate expression of the policy of achieving better enforcement of support obligations against out-of-state obligors.

In enacting this section, the Legislature intends to avail itself of the opportunity accorded to it by the United States Supreme Court in Kulko v. Superior Court, ~~56 L. Ed. 2d 132~~ *(1978), 436 U.S. 84, 98,* to express the state's deep concern for the realization of support obligations in cases involving California claimants and absent defendants.

(b) Notwithstanding any other provision of law, a court of this state may exercise jurisdiction to establish support, modify support, or establish paternity if the person on whose behalf the action is brought resides in this state.

O

Professor Friedrich K. Juenger
Phone: (916) 752-2897
Fax: (916) 752-4704/0822

March 3, 1994

The Honorable Diane Martinez
Assemblywoman, Forty-Ninth District
State Capitol
Sacramento, CA 95814

Dear Ms. Martinez:

You have asked me about the constitutional implications of AB 3151, the bill on jurisdiction in interstate child support cases of which I am the sponsor. I understand that your inquiry was prompted by the letter of a judge, who noted that California Code of Civil Procedure § 410.10 already empowers California courts to exercise jurisdiction on any basis that is not inconsistent with the state and federal constitutions. The judge also referred to the Kulko case, in which the United States Supreme Court held that a California court could not validly assert personal jurisdiction over a nonresident father, from which he concluded that the statute I drafted would be declared unconstitutional.

As far as the need for such a statute is concerned, please note that Justice Marshall's majority opinion in Kulko states that California has "not attempted to assert any particularized interest in trying such cases in its courts by, e.g., enacting a special jurisdictional statute." Kulko v. Superior Court, 436 U.S. 84, 98 (1978). In this connection he cites McGee v. International Life Insurance Co., 355 U.S. 220, 221, 224 (1957), where California had asserted such a "particularized interest" by means of a statute that dealt specifically with jurisdiction over foreign insurers. On the basis of this enactment the Court upheld California's jurisdiction over a Texas insurance company. This should explain the constitutional relevance of AB 3151.

There is also precedent for this kind of legislation. Twenty years after McGee Justice Marshall, in Shaffer v. Heitner, 433 U.S. 186, 214 (1977), rejected the argument that Delaware might have a constitutionally cognizable interest in asserting jurisdiction for the purpose of supervising the management of a Delaware corporation. The argument, he wrote, was "undercut by the failure of the Delaware Legislature to assert the state interest appellee finds so compelling." Taking advantage of Judge Marshall's

suggestion that the state might expand constitutionally permissible jurisdiction by its own legislative action, the Delaware legislature shortly thereafter enacted a statute specifically dealing with foreign management to supply the missing interest. The constitutionality of the statute was upheld by the Delaware Supreme Court in 1980. As a federal district court judge, rejecting a constitutional challenge against the statute, observed,

> when the Delaware legislature drafted 10 Del. Code § 3114 in response to *Shaffer* . . . the legislature specifically addressed the issues that had troubled the Court in *Shaffer*. As a result, the Delaware Supreme Court has held 10 Del. Code § 3114 constitutional. . . . This Court agrees with that holding.
>
> In re Mid-Atlantic Toyota Antitrust Litig., 525 F.Supp. 1265, 1271 (D. Md. 1981).

I hope that this explanation clarifies the rationale for my proposal. My draft is premised on the fact that the Kulko opinion points out an avenue for legislative action that has proved successful in two well-known examples. I should, however, also like to mention that additional reasons support the draft.

Even without state legislation Kulko has been weakened by the passage of time and later developments. Not only has the Court's composition changed, but Justice Marshall's assumption that "California's legitimate interest in ensuring the support of children resident in California . . . is already being served by the State's participation in the Revised Uniform Reciprocal Enforcement of Support Act of 1968," is -- as family law experts assure me -- clearly wrong. In fact, the Court later acknowledged the Act's insufficiencies, thus shedding doubt on the basis for the Court's opinion in Kulko. See Jones v. Helms, 452 U.S. 412, 425 (1981).

Moreover, Kulko's reliance on a distinction between commercial transactions, torts and domestic relations is unpersuasive. According to Kulko's three dissenters, "appellant's connection with the State of California was not too attenuated, under the standards of reasonableness and fairness implicit in the due process clause, to require him to conduct his defense in the California courts." Finally, the recent case of Burnham v. Superior Court suggests that, in proper cases, a state may exercise jurisdiction even in the absence of "minimum contacts."

Please note that the solution I propose to a pressing problem is accepted by international conventions and foreign legal systems. Justice Marshall's language in Kulko suggests it is acceptable here, too, if the California legislature desires it. Surely, providing long-arm jurisdiction over those obligated to support California's children is at least as important as providing jurisdiction over out-of-state insurers (McGee) and nonresident corporate directors (Shaffer).

I hope that this brief summary of my reasons allays your concern about the bill's possible constitutional infirmity. I stand of course ready to answer any questions you may have and would be pleased to discuss them at any time that is convenient to you.

Yours sincerely,

Friedrich K. Juenger
Barrett Professor of Law

FKJ/bl

b/martinez.ltr

COPY

April 13, 1994

The Honorable Diane Martinez
Assemblywoman, 49th District
State Capitol
Sacramento, CA 95814

Dear Assemblywoman Martinez:

You have asked me for comments about Judge Richard E. Denner's letter of March 29, 1994, which comments on my earlier communication to you.

(1) In my opinion, parents with children in California have more than minimal contacts with the state. Dubin v. City of Philadelphia held that the presence of real property within a state confers jurisdiction with respect to actions for damages caused by such property. The personal ties between parents and children are surely no less significant than the attachment a person may have to his land, and the expense of caring for one's offspring is no less foreseeable than the injuries untended real estate may cause. Moreover, in Burnham v. Superior Court the United States Supreme Court has cut back on the need for minimum contacts. If service on the defendant during a three-day stay in California suffices to meet Due Process concerns, so should the presence of the defendant's offspring.

(2) In Kulko Justice Marshall did not maintain that contacts were lacking. Rather, he questioned whether the defendant New York dentist had "purposefully availed himself" of the benefits and protections of California law. In this connection he drew a distinction between torts and commercial transactions on the one hand and domestic relations on the other. Hence, Justice Marshall did not deny that there were contacts; rather, weighing the contacts in the light of substantive policy considerations he found them too attenuated. Specifically, he argued that the Uniform Reciprocal Enforcement of Support Act (URESA) sufficiently protects support claimants and that California lacked an interest in asserting jurisdiction because of the state's failure to claim a "particularized interest" by means of an appropriately worded statute.

(3) The Supreme Court has since retreated from the first of these two assumptions; the second one is the subject of the legislative proposal to which Judge Denner's letter is

addressed. Because Justice Marshall emphasized that the "minimum contacts" test is not susceptible of mechanical application and that the facts of each case must be weighed, I doubt that his statement about the state's failure to assert a particularized interest can fairly be characterized as surplusage. Courts and legal scholars have long wrestled with the distinction between ratio decidendi and obiter dictum without succeeding in drawing a satisfactory line between them. Clearly, if California had had on its book a statute of the kind I propose, the Kulko Court would have been hard pressed to distinguish the McGee case, which attributed decisive importance to the fact that California had demonstrated an interest by virtue of a statute specifically directed at nonresident insurers.

(4) Even if Justice Marshall's statement about the need for a particularized interest could be characterized as a dictum, I submit that United States Supreme Court dicta are entitled to respect. This is certainly what the Delaware legislature believed when, in response to a similar invitation extended in Shaffer v. Heitner, it asserted the very "particularized interest" for which Justice Marshall had asked. This Delaware enactment, which confers jurisdiction over nonresident management (a jurisdiction that according to Shaffer violated the Fourteenth Amendment's Due Process clause), has withstood constitutional challenges in the courts that have considered the question.

(5) Finally, with respect to Judge Denner's concern about forum shopping, we should bear in mind that the opportunity afforded by California Code of Civil Procedure § 410.30 to dismiss or stay actions on forum non conveniens grounds affords ample opportunity to rebuff abuses and impositions on the California judiciary.

Although in an area as confused as that of jurisdiction one can never be certain about what the Supreme Court will do next, I am confident that the statute I propose will pass constitutional muster.

Yours sincerely,

Friedrich K. Juenger
Barrett Professor of Law

pax version 1.2

BILL ANALYSIS

AB 3151

Date of Hearing: May 11, 1994

ASSEMBLY COMMITTEE ON JUDICIARY
Phillip Isenberg, Chair

AB 3151 (Martinez) - As Introduced: February 23, 1994

SUBJECT: This bill seeks to establish the jurisdiction of California courts over child support cases that currently are under the jurisdiction of courts in other states.

BACKGROUND

DIGEST

Existing statutory law:

1) Provides that a court must have both "in personam" and "subject matter" jurisdiction over a case, and the failure to obtain either type of jurisdiction will render any order made by the court invalid.

   a) "In personam" (personal) jurisdiction means jurisdiction over the person of the parties. The petitioner in a case subjects him or herself to the personal jurisdiction of the court when the petition or complaint is filed with the court. Personal jurisdiction over the respondent is obtained by personally serving the individual, as provided by statute.

   b) "Subject matter" jurisdiction is obtained over any issue raised by either party in their moving papers (the petition or response).

2) Provides the Uniform Reciprocal Enforcement of Support Act (URESA), a uniform act for the registration of foreign support orders (orders made in another state), so that such orders may be modified or enforced in California, and California orders may be modified and enforced in other states.

Existing case law provides rules for the assertion of jurisdiction of one state over the residents or subject matter of another state, most significantly in Kulko v. Superor Court of California In and For San Francisco (1978) 438 U.S. 908, the U.S. Supreme Court held that a California court could not assert jurisdiction over a New York father for purposes of modifying a support order.

In Kulko, the parties lived in New York prior to their dissolution. After she obtained a Haitian divorce, the mother went to live in California and the father remained in New York with the two children. Some time later, the daughter asked to move to California to be with mother, and the father agreed. Thereafter, mother sent a plane ticket to the son (without the father's knowledge), and

- continued -

the son flew to California and stayed. One month later, the mother moved in a California court for an order modifying the New York custody and support order.

The Supreme Court held that the California court's assertion of jurisdiction violated the father's due process rights because the father had no "minimum contacts" with the state, as required by long-standing federal case law in Interntional Shoe v. Washington 326 U.S. 310; Pennoyer v. Neff 95 U.S. 714; Milliken v. Meyer 311 U.S. 457 and Shaffer v. Heitner 433 U.S. 186.

The mother argued that the father's actions in allowing the daughter to come to California to live, thus causing an "effect" in California, met the "minimum contacts" requirement. The Supreme Court disagreed, noting that cases providing for such "long-arm jurisdiction" based upon "effects" involved wrongful activity by an outside of the forum state causing injury within the forum state (McGee v. International Life Insurance Co. 355 U.S. 220). The court found no such injury here.

Next, the mother argued that California's legitimate interest in ensuring that all child residents receive adequate child support was sufficient to assert jurisdiction. Again, the court disagreed, noting that California's interest, while legitimate, could be met through use of URESA.

This bill provides that, notwithstanding any other provision of law, a court of this state may exercise jurisdiction to establish or modify support or establish paternity if the person on whose behalf the action is brought resides in California.

FISCAL EFFECT

This bill will not be referred to the Assembly Committee on Ways and Means.

COMMENTS

1) Author's Statement. According to the author, under current law, California courts do not have jurisdiction over actions to establish or modify support or establish paternity on behalf of a child who resides in California where the parent against whom the case is being brought resides outside the state. The author argues this bill takes advantage of Justice Marshall's majority opinion in Kulko to particularize California's interest in gaining jurisdiction over these out-of-state cases.

2) Issues. This bill raises several issues:

   Constitutionality. The author has had the assistance of Professors Carol Bruch and Friedrich Juenger of the University of California at Davis Law School in analyzing whether this bill would violate the U.S. Constitution. The professors argue that Justice Marshall indicated in his opinion that the court would find differently if California had enacted a statute evidencing a particularized interest in providing

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for special jurisdiction in child support cases.

This assumption is arguable. When the mother argued that jurisdiction over the father should be upheld because of California's particularized interest, Justice Marshall responded with three pertinent comments:

> While the presence of the children and one parent in California arguably might favor application of California law in a lawsuit in New York, the fact that California may be the "center of gravity" for choice of law purposes does not mean that California has personal jurisdiction over the defendant.
>
> And California has not attempted to assert any particularized interest in trying such cases in its courts by, for example, enacting a special jurisdiction statute.
>
> California's legitimate interest in ensuring the support of children residents in California without unduly disrupting the children's lives, moreover, already is being served by the state's participation in URESA.

Taken as a whole, the majority opinion found that: (a) there were insufficient minimum contacts to require the father to travel to a forum 3,000 miles away when it was the mother's choice to move to California to remarry; (b) the father had caused no "effects" in California that would support a finding of special jurisdiction, (c) even though California had a legitimate particularized interest in obtaining support for child residents, such support could be obtained by suit in New York through URESA and (d) use of URESA would enable the mother to modify the New York support order without either party having to leave their home state.

Conflicts. If this bill were to pass, it would result in a California court issuing orders in a case already under the jurisdiction of a court in another state. This would result in conflicting orders for the family involved. Using the Kulko facts, for example, with this bill, if California modified a New York order to pay $750 per month support by making a California order to pay $1,000 per month support, which order would the father be required to pay? Could his wages and taxes be attached for the failure to pay the higher amount?

A primary function of uniform acts is to provide a procedural mechanism to ensure that only a single state will have jurisdiction at any point in time. To provide otherwise is to invite chaos. Family law uniform acts such as URESA and UCCJA (Uniform Child Custody Jurisdiction Act) provide bases for asserting jurisdiction, communicating with another court having jurisdiction and transferring jurisdiction. The procedures are complex and provide a delicate balancing of the interests of each state in protecting the interests of its own residents.

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Another potential outcome from passage of this bill is retaliation by other states whose jurisdiction has been usurped by California. States tend to be possessive of their authority over their cases and residents.

Retaliation can take two forms. First, other states may create their own long-arm statutes, with the result that URESA would no longer be effective. Second, if California unilaterally takes jurisdiction from another state, that state is less likely to "give up" its jurisdiction in a case where it might otherwise have done so to the benefit of a California resident (say, in a UCCJA dispute). Thus, in exchange for providing a questionably enforceable order to one set of California residents, we are risking necessary standard protections already provided for other California residents.

Necessity. Under URESA, any California parent can modify or enforce an order under the jurisdiction of another state. The California resident simply "registers" the order in the court in the other state. This can be done directly by the person or through the district attorney (DA) who will do all of the work at no charge. If the registering party does not wish to travel to the other state, the DA here will contact a DA in the other state who will appear on the case.

The author argues that URESA is not efficient enough, but she provides no data to explain or support this contention. The URESA statute currently is being modified by federal statute to make it even more efficient. AB 20 (Sher) now in the Senate Judiciary Committee, is California's version of the new URESA (now called UIFSA, the Uniform Interstate Family Support Act).

Most URESA cases are handled by DAs. As more of California's DAs get computerized (as is required by federal law), the more efficient the handling of URESA cases will be. Further, when DAs handle cases, some percentage will be resolved by stipulation or default. This significantly lessens the burdens on courts. If some large number of persons brought these out-of-state cases into the California courts, which already are seriously overloaded, it will result in delays for all California cases.

Federal and State activity. The federal government, aside from legislating UIFSA, is looking at mandating states to adopt some form of administrative process for child support cases. In California, the governor's Child Support Advisory Task Force is looking at changing the way California handles its child support cases and hopes to make a recommendation this fall. Further, SB 407 (Hughes), currently in Assembly Judiciary Committee, provides for an administrative process for handling child support cases.

It may be premature for the Legislature to enact such a significant change in procedure, as provided for by this bill, until it is clear what type of system California will be using.

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UNIFORM HEALTH-CARE DECISIONS ACT

PREFATORY NOTE

Since the Supreme Court's decision in *Cruzan v. Commissioner, Missouri Department of Health*, 497 U.S. 261 (1990), significant change has occurred in state legislation on health-care decision making. Every state now has legislation authorizing the use of some sort of advance health-care directive. All but a few states authorize what is typically known as a living will. Nearly all states have statutes authorizing the use of powers of attorney for health care. In addition, a majority of states have statutes allowing family members, and in some cases close friends, to make health-care decisions for adult individuals who lack capacity.

This state legislation, however, has developed in fits and starts, resulting in an often fragmented, incomplete, and sometimes inconsistent set of rules. Statutes enacted within a state often conflict and conflicts between statutes of different states are common. In an increasingly mobile society where an advance health-care directive given in one state must frequently be implemented in another, there is a need for greater uniformity.

The Health-Care Decisions Act was drafted with this confused situation in mind. The Act is built around the following concepts. *First*, the Act acknowledges the right of a competent individual to decide all aspects of his or her own health care in all circumstances, including the right to decline health care or to direct that health care be discontinued, even if death ensues. An individual's instructions may extend to any and all health-care decisions that might arise and, unless limited by the principal, an agent has authority to make all health-care decisions which the individual could have made. The Act recognizes and validates an individual's authority to define the scope of an instruction or agency as broadly or as narrowly as the individual chooses.

Second, the Act is comprehensive and will enable an enacting jurisdiction to replace its existing legislation on the subject with a single statute. The Act authorizes health-care decisions to be made by an agent who is designated to decide when an individual cannot or does not wish to; by a designated surrogate, family member, or close friend when an individual is unable to act and no guardian or agent has been appointed or is reasonably available; or by a court having jurisdiction as decision maker of last resort.

Third, the Act is designed to simplify and facilitate the making of advance health-care directives. An instruction may be either written or oral. A power of attorney for health care, while it must be in writing, need not be witnessed or acknowledged. In addition, an optional form for the making of a directive is provided.

Fourth, the Act seeks to ensure to the extent possible that decisions about an individual's health care will be governed by the individual's own desires concerning the issues to be resolved. The Act requires an agent or surrogate authorized to make health-care decisions for an individual to make those decisions in accordance with the instructions and other wishes of the individual to the extent known. Otherwise, the agent or surrogate must make those decisions in accordance with the best interest of the individual but in light of the individual's personal values known to the agent or surrogate. Furthermore, the Act requires a guardian to comply with a ward's previously given instructions and prohibits a guardian from revoking the ward's advance health-care directive without express court approval.

Fifth, the Act addresses compliance by health-care providers and institutions. A health-care provider or institution must comply with an instruction of the patient and with a reasonable interpretation of that instruction or other health-care decision made by a person then authorized to make

health-care decisions for the patient. The obligation to comply is not absolute, however. A health-care provider or institution may decline to honor an instruction or decision for reasons of conscience or if the instruction or decision requires the provision of medically ineffective care or care contrary to applicable health-care standards.

Sixth, the Act provides a procedure for the resolution of disputes. While the Act is in general to be effectuated without litigation, situations will arise where resort to the courts may be necessary. For that reason, the Act authorizes the court to enjoin or direct a health-care decision or order other equitable relief and specifies who is entitled to bring a petition.

The Health-Care Decisions Act supersedes the Commissioners' Model Health-Care Consent Act (1982), the Uniform Rights of the Terminally Ill Act (1985), and the Uniform Rights of the Terminally Ill Act (1989). A state enacting the Health-Care Decisions Act which has one of these other acts in force should repeal it upon enactment.